UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

File 8154

JUN 28 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM:

TO: Robert A. Emmett
Water Enforcement (EG-338)

FROM: Nancy L. Speck
Office of General Counsel, Water (EG-331)

SUBJECT: Hawaii NPDES approval - variance procedure

I've reviewed the variance procedure in the Hawaii statute, and the regulatory provisions that are designed to overcome the variance clause. Frankly, I'm not convinced. The variance provision establishes a statutory "right" in a discharger to have a request for a variance considered and granted if the discharger's continued operation is in the public interest, if the discharge does not substantially endanger public health or safety, and if the hardship in complying with the standards from which the variance is sought is greater than the benefit to the public.

This procedure is one which is apparently to be applied in the permit writing process itself rather than as a modification-type of procedure. As such this procedure seems to insert into the permitting process the very kinds of considerations that the 1972 Act was designed to remove. In fact, these criteria are possibly even less stringent than water quality considerations; the water quality standards goals are to protect fish and wildlife and recreation in and on the water; the consideration here is substantial danger to public health and safety. Nor do the water quality standards involve the kind of cost-benefit type of analysis contemplated in this provision.

I realize that this section says that a variance cannot be granted unless these criteria are met. Theoretically, the department is not prohibited from establishing other conditions under which a variance would not be granted. However, the discretion should have to be exercised reasonably and so as not to vitiate the statutory

provision, and so as not to be arbitrary and capricious. I can't see how an attempt, by regulation, to read these considerations out of the statute altogether (even if the regulations do this, which I'm not convinced they do) could possibly be sustained. In my view the statute clearly compels the department to consider these factors, and to be answerable on review subject to the standard tests measuring the exercise of administrative discretion.

I have similar difficulties with the provision allowing a variance to be granted for a ten-year period. I realize that this is a maximum and that the regulations say five years, and that even this is a maximum which can be shortened to not exceed the compliance dates set in the FWPCA. Basically what the Department is trying to do here is narrow its discretion across the board for all future cases, without regard to specific situations. I believe there is some case law indicating that exercise of administrative authority in this way is an abuse of discretion. I would be interested in knowing the Hawaii AG's opinion specifically on the validity of this type of exercise of discretion under Hawaii law.

I would reiterate here the views that I expressed to you on a similar situation in the Kansa program. I believe that they apply here as well. I don't think that the Hawaii program is approvable with this provision in it.

Nancy

Nancy L. Speck